Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Wireless Telecommunications Bureau	)	WT Docket No. 13-135
Seeks Comment on the State of Mobile	)	
Wireless Competition	)	

COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION

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Competitive Carriers Association ("CCA") hereby submits comments in response to the Public Notice soliciting input and data for the Commission's Seventeenth Annual Report on the State of Competition in Mobile Wireless, including Commercial Mobile Radio Services.[1] CCA is the nation's leading association of competitive wireless carriers. CCA's membership comprises over 100 carriers ranging from small, rural providers serving fewer than 5,000 customers to regional and national providers serving millions of customers. CCA also represents almost 200 Associate Members, consisting of small businesses, vendors, and suppliers that serve carriers of all sizes.

INTRODUCTION AND SUMMARY

Since comments were filed in connection with the Commission's last Wireless Competition Report, CCA rebranded itself as "Competitive Carriers Association."[2] CCA implemented this change to more accurately reflect the composition of its membership and to signify the overriding policy issue affecting the wireless industry: the perilous state of

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1 *Wireless Telecommunications Bureau Seeks Comment on the State of Mobile Wireless Competition*, Public Notice, WT Docket No. 13-135, DA 13-1139 (May 17, 2013).

2 CCA previously was known as "RCA—The Competitive Carriers Association," and prior to that, "Rural Cellular Association."

competition. CCA's members, from its smallest, rural carrier members to its largest, national carrier members, are united in their focus on the need for a more competitive wireless sector, and their concerns about the market power exercised by AT&T and Verizon to foreclose competition. Despite growing demand for mobile voice and data services, the benefits of such growth have inured principally to the two super carriers, AT&T and Verizon. The Sixteenth Mobile Competition Report revealed an alarming state of concentration in the wireless industry. And still, it continues to grow even more concentrated. What was once a robustly competitive industry a decade ago has become effectively a duopoly, as AT&T and Verizon dominate the industry by any conceivable metric, whether subscriber count, revenues, earnings, holdings of valuable "beachfront" spectrum, or access to cutting-edge devices.

As the Commission evaluates the state of competition in the wireless industry, it should look not only to the past and present to understand the current state of competition, but also to the future. The Commission must decide which path it wants to pursue to create the wireless industry of the next decade. One road leads to vibrant competition—and all the benefits that flow from such competition: including the efficient allocation of scarce resources, greater innovation, lower consumer prices, and increased quality of goods and services. Alternatively, the Commission can choose the path of least resistance, which will allow competition to continue to deteriorate and AT&T and Verizon to cement their dominant position, invariably leading to lower innovation, inferior services, a poorer allocation of scarce resources, and higher prices over time. Heavy-handed regulation will be required to combat the harms of this latter course.

CCA strongly urges the Commission to use its annual assessment of competition as a catalyst to pursue a light-touch regulatory agenda that will improve the competitive conditions in the industry. In particular, the Commission should adopt rules to safeguard competitive carriers' access to the critical input of spectrum—both by updating the “spectrum screen” used to evaluate wireless acquisitions, and by structuring spectrum auctions in a way that encourages participation by a range of competitive carriers.

The Commission should facilitate access to devices by restoring interoperability in the Lower 700 MHz band and by working with the Copyright Office to reinstate consumers’ ability to unlock their handsets. And the Commission also should ensure that its rules preserve competitive carriers’ access to other providers’ networks, by enforcing roaming requirements and by reaffirming interconnection obligations. Such measures, if adopted and implemented promptly, would represent important steps towards ameliorating duopoly conditions and restoring competition in this once-vibrant marketplace.

The Commission currently is pursuing several ambitious, potentially game-changing rulemaking proceedings, including a proceeding to restore interoperability in the 700 MHz band, a reassessment of spectrum aggregation rules, the 600 MHz incentive auction, overseeing the Internet Protocol (IP) transition, and continuing its historical overhaul of the universal service system, among others. The Commission also has pending before it several major transactions. Because each of these ongoing proceedings could have a significant impact on the state of competition, the Commission should ensure that its analysis appropriately accounts for these open issues, and if necessary should defer its assessment until some of these major proceedings are resolved. Moreover, since the Commission only recently issued its last report, it has an adequate amount of time to perform the fulsome assessment necessary to form the foundation for any regulatory reform. CCA looks forward to working with the Commission to improve the state of competition in the wireless industry.

DISCUSSION

I. THE WIRELESS INDUSTRY IS GROWING EVER MORE CONCENTRATED AND IS DOMINATED BY AT&T AND VERIZON

To fully appreciate the current state of competition in the wireless industry, the Commission should consider the developments in the marketplace that have occurred over the last two decades. The wireless industry was viewed as "one of the great success stories" of the Commission's efforts to develop and implement a regulatory framework that would promote competition.[3] What began as a true duopoly, with a total of 50 MHz of cellular spectrum in each local area allocated between just two providers, was broken in 1994, when the Commission first used its newly ratified auction authority to bring 120 MHz of broadband PCS spectrum to market.[4] With a combination of procompetitive spectrum aggregation and pro-participation auction rules, the Broadband PCS auction spawned the creation of numerous competitive carriers across the country.[5] Subsequent auctions in the SMR, AWS, 700 MHz,[6] and other bands created an opportunity for further competition and the potential for growth of competitive alternatives to the largest providers. For the first 13 wireless competition reports released between 1995 and

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3 *See* CTIA, Interview with Kevin Martin, at 6, Wireless Wave (Fall 2005), *available at* http://www.ctia.org/advocacy/index.cfm/AID/10522.

4 *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, First Report, 10 FCC Rcd 8844 ¶¶ 3, 4 (1995).

5 *Id.* ¶ 4 (noting that broadband PCS spectrum was believed to be sufficient to give rise to "at least three, and possibly as many as six, new competitors to the cellular carriers in each market").

6 Here we refer to Auctions 44 and 92. As set forth herein, Auction 73 was not a success for competitive carriers.

2009, the Commission was able to conclude that the wireless industry was characterized by either growing or effective competition.[7]

Unfortunately, despite the past success of the Commission's regulatory framework in promoting wireless competition, the wireless industry once again has reverted to a virtual duopoly, dominated by AT&T and Verizon. A spate of acquisitions by the Twin Bells in recent years has robbed the wireless marketplace of its former vibrancy. As the GAO observed in a 2010 report, "[o]ver the past 10 years, consolidation in the wireless industry has generally been accomplished through a series of mergers and acquisitions," including Cingular's acquisition of AT&T in 2004, AT&T's acquisition of Dobson in 2007, Verizon's acquisition of ALLTEL in 2008, and AT&T's acquisition of Centennial in 2009.[8] In addition to these mega-mergers, numerous other competitive carriers have exited the market via acquisition by AT&T and Verizon, including Rural Cellular Corporation, Aloha Wireless, and Edge Wireless.[9] The GAO accordingly concluded that the "primary change in the wireless industry" over the last decade is

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7 *See, e.g., id.* ¶ 2 (noting the "growing competition" in the wireless industry); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Thirteenth Report, 24 FCC Rcd 6185 ¶ 1 (2009) ("The metrics . . . indicate that there is effective competition in the CMRS market and demonstrate the increasingly significant role that wireless services play in the lives of American consumers.").

8 U.S. Gov't Accountability Office, GAO-10-779, *Telecommunications: Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry*, at 11 (2010), *available at* http://www.gao.gov/new.items/d10779.pdf ("GAO Study").

9 *See Applications of Cellco Partnership d/b/a/ Verizon Wireless and Rural Cellular Corporation for Consent To Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases*, Memorandum Opinion and Order, 23 FCC Rcd 12463 (2008); *Application of Aloha Spectrum Holdings Co. LLC and AT&T Mobility II LLC Seeking FCC Consent for Assignment of Licenses and Authorizations*, Memorandum Opinion and Order, 23 FCC Rcd 2234 (2008); Press Release, AT&T Completes Acquisition of Edge Wireless to Enhance Wireless Coverage, Apr. 18, 2008, *available at* http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=25521.

"industry consolidation," noting that from 2006 to 2009, AT&T and Verizon increased their subscriber market share by a combined 30 percent.[10]

Subsequent to the GAO's study the pace of consolidation has increased, as AT&T and Verizon not only have acquired smaller rivals but have engaged in significant spectrum-only transactions that have strengthened their position vis-à-vis competitive carriers. These transactions include Verizon's 2012 acquisition of AWS-1 licenses from SpectrumCo and Cox,[11] and AT&T's 2011 acquisition of Qualcomm's nationwide Lower 700 MHz downlink spectrum[12] and 2012 acquisition of NextWave Wireless and its substantial WCS and AWS spectrum holdings.[13] Most recently, AT&T and Verizon have proposed a massive swap of licenses among themselves, which poses several threats to competition.[14]

The result of all this consolidation is a markedly different competitive landscape than the one that existed a decade ago. In its three most recent Wireless Competition Reports, the Commission has been unable to certify that the wireless industry is characterized by "effective

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10 GAO Study at 10, 13.

11 *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses*, Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd 10698 (2012) ("*Verizon-SpectrumCo Order*")

12 *Application of AT&T Inc. and Qualcomm Incorporated For Consent to Assign Licenses and Authorizations*, Order, 26 FCC Rcd 17589 ¶ 30 (2011).

13 *Applications of AT&T Mobility Spectrum LLC, New Cingular Wireless PCS, LLC, Comcast Corporation, Horizon Wi-Com, LLC, NextWave Wireless, Inc., and San Diego Gas & Electric Company for Consent To Assign And Transfer Licenses*, Memorandum Opinion and Order, 27 FCC Rcd 16459 (2012).

14 *See AT&T Inc., Cellco Partnership d/b/a Verizon Wireless, Grain Spectrum, LLC, and Grain Spectrum II, LLC seek FCC Consent to the Assignment of Advanced Wireless Services and Lower 700 MHz Band B Block Licenses and to Long-Term* De Facto *Transfer Spectrum Leasing Arrangements Involving Advanced Wireless Services and Lower 700 MHz Band B Block Licenses*, Public Notice, 28 FCC Rcd 2176 (WTB Mar. 5, 2013); Petition for Conditions of Competitive Carriers Association, WT Docket No. 13-56 (filed Apr. 4, 2013).

competition."[15] The last Report, issued just three months ago, found that the wireless industry is highly concentrated and that such concentration has increased markedly in recent years.[16] The Report pointed to a steady increase in the Herfindhal-Hirschman Index (HHI), a common indicator of industry consolidation, and found that the wireless industry's HHI value had grown to 2,873 by the end of 2011—373 points higher than the threshold necessary to classify a market as "highly concentrated," and 722 points higher than the level measured in 2003 (the first year the FCC calculated HHIs).[17] The report also found that AT&T and Verizon together account for an astounding 67 percent of industry revenue.[18] Notably, that combined revenue share is far higher than the combined shares for the top two firms in other "consolidated" industries. For example, the top two firms in the auto industry hold a 35 percent share of total revenue; the top two firms in the oil industry hold 24 percent share; and the top two firms in the banking industry hold a 20 percent share.[19]

The Sixteenth Wireless Competition Report also found that AT&T and Verizon possess a dominant position in spectrum holdings below 1 GHz—spectrum that is vital to competitive

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15 *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Mobile Conditions with Respect to Commercial Mobile Services*, Sixteenth Report, WT Docket No. 11-186, ¶¶ 14-15 (rel. Mar. 21, 2013) ("16th Wireless Competition Report"); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Mobile Conditions with Respect to Commercial Mobile Services*, Fifteenth Report, 26 FCC Rcd 9664 ¶ 14 (2011) ("15th Wireless Competition Report"); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, 25 FCC Rcd 11407 ¶ 16 (2010) ("14th Wireless Competition Report").

16 16th Wireless Competition Report ¶ 2.

17 *Id.*

18 *Id.* ¶ 52.

19 *See* Free Press, *Why the AT&T-T-Mobile Deal Is Bad for America*, Mar. 22, 2011, at 1, *available at* http://www.freepress.net/sites/default/files/fp-legacy/ATT-TMobile.pdf.

carriers' ability to expand their network coverage and effectively compete against AT&T and Verizon. The Report concluded that the Twin Bells "together hold approximately 90 percent of Cellular spectrum based on megahertz-POPs (MHz-POPs), which was the first band to be licensed for commercial mobile services and has the most extensive network buildout."[20] And despite the recentness of the Commission's latest report, it is clear that AT&T and Verizon remain active in pursuing secondary market spectrum transactions that will further solidify their dominance, as AT&T and Verizon account for 60% of all assignment and transfer applications filed so far in 2013, and over 80% of all license applications involving spectrum below 1 GHz.

In addition, while AT&T and Verizon continually tout the growth in the wireless industry, which reflects increasing consumer demand for wireless voice and data services, the unfortunate reality is that the lion's share of that growth has been enjoyed by AT&T and Verizon. While the industry *overall* has witnessed growth, a more granular analysis reveals that AT&T and Verizon have reaped the benefits of that growth at the expense of other carriers. AT&T and Verizon continue to enjoy net subscriber additions each quarter, while other carriers face mounting losses. AT&T and Verizon likewise regularly enjoy EBITDA/OBITDA margins that are higher than those of other carriers, and the profitability gap continues to widen. AT&T and Verizon now account for approximately 70 percent of wireless subscribers and 80 percent of industry revenue.[21] Thus, while growth in the wireless industry has been good for AT&T and Verizon, it also has enabled them to cement their dominance relative to competitors. And while

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[20] 16th Wireless Competition Report ¶ 2. The Report also found that "Verizon Wireless holds 45 percent of the MHz-POPs of Cellular and 700 MHz spectrum combined, while AT&T holds approximately 39 percent." *Id*.

[21] *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, Staff Analysis and Findings, 26 FCC Rcd 16184 ¶ 37 (WTB 2011) ("*AT&T-T-Mobile Staff Analysis*") (finding that AT&T and Verizon account for approximately 80% of industry EBITDA).

CTIA points to increased levels of capital investment as a sign that all is well in the industry,[22] the relevant analysis should look not only to absolute investment figures or growth over the prior year, but to what level of investment would occur if the industry were genuinely competitive.

In sum, the wireless industry continues to be highly concentrated, and AT&T's and Verizon's dominance is steadily growing. This competitive state of affairs puts into sharp relief the regulatory choices that the Commission faces: take action now to promote competition and restore the vibrant industry from years past, or allow the industry to complete its descent into duopoly.

II. THE COMMISSION'S COMPETITIVE ANALYSIS SHOULD SERVE AS A SPRINGBOARD TO IMPROVING COMPETITIVE CONDITIONS AND PRESERVING ACCESS TO KEY INPUTS

As the Commission conducts its analysis of the state of competition in the wireless industry, it should use that assessment to develop a regulatory framework that will restore competition. As discussed in greater detail below, the Commission should take action in four areas to promote competition and prevent further consolidation. First, the Commission should adopt rules to safeguard competitive carriers' access to spectrum by updating the "spectrum screen" used to evaluate wireless transactions, using that revised screen in the upcoming incentive auction, and structuring that auction in a manner that encourages and rewards participation by a broad array of carriers. Second, the Commission should facilitate access to devices by restoring interoperability in the Lower 700 MHz band, and by working with the Copyright Office to reinstate consumers' ability to unlock their handsets. Third, the Commission should preserve competitive access to networks by enforcing roaming obligations and by

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22 *See* Testimony of Steve Largent, CTIA—The Wireless Association, "State of Wireless Communications," U.S. Senate Committee on Commerce, Science, and Transportation, Subcommittee on Communications, Technology, and the Internet, at 1 (June 4, 2013) *available at*: http://tinyurl.com/q8dpgqe.

reaffirming interconnection obligations, regardless of what technology is used to interconnect. Finally, the FCC must restore technological and competitive neutrality to its universal service system, freeing up more funding for cost-efficient and consumer-preferred mobile services.

A. Access to Spectrum

The Commission has long understood that "[s]pectrum is the lifeblood of the wireless industry," and CCA agrees that the Commission "has a unique responsibility to ensure that spectrum is allocated in a manner that promotes actual and potential competition and that incentives are maintained for innovation and efficiency in the mobile services marketplace."[23] Access to spectrum is a "precondition to the provision of mobile wireless services" and is "critical for promoting the competition that drives innovation and investment."[24]

The Department of Justice ("DOJ") echoed this sentiment in its recent filing in the incentive auction proceeding, where it stated that soaring demand for mobile broadband in recent years has "made spectrum a critically scarce resource" for wireless carriers.[25] Both DOJ and this Commission also have recognized that access to low-frequency spectrum—which can provide "the same geographic coverage, at a lower cost, than higher-frequency bands"[26]—is especially important for new entrants and smaller carriers. Accordingly, DOJ urged the Commission to adopt rules ensuring that competitive carriers have the opportunity to acquire spectrum, particularly in low-frequency bands—a measure that DOJ says would "improve the competitive

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[23] *Application of AT&T Inc. and Qualcomm Incorporated For Consent to Assign Licenses and Authorizations*, Order, 26 FCC Rcd 17589 ¶ 30 (2011).

[24] *Policies Regarding Mobile Spectrum Holdings*, Notice of Proposed Rulemaking, 27 FCC Rcd 11710 ¶ 4 (2012).

[25] Ex Parte Submission of the U.S. Dep't of Justice, WT Docket No. 12-269, at 9 (filed Apr. 11, 2013) ("DOJ Ex Parte Submission").

[26] 16th Mobile Wireless Competition Report ¶ 122.

dynamic" in the industry and "benefit consumers."[27] Notably, former Attorney General Dick Thornburgh, who served under presidents Reagan and George H.W. Bush, endorsed DOJ's analysis and concluded that it "is fully consistent with [DOJ's] longstanding approach to competition policy under Republican and Democratic administrations alike."[28] CCA and its members, along with a broad array of trade associations and public interest groups also support DOJ's submission.[29] The Commission should therefore take concrete steps to ensure competitive carriers' access to needed spectrum.

Specifically, the Commission should act promptly to conclude its review of its spectrum aggregation policies and develop an improved spectrum screen. As CCA has explained, the blunt, single-trigger screen that the Commission adopted a decade ago (before the recent wave of consolidation) fails to advance the Commission's stated goals in today's marketplace.[30] Among other things, the current screen fails to account for important differences between high and low frequency spectrum bands,[31] and largely ignores the competitive effects of spectrum aggregation at the national level, which the Commission now recognizes is a critical component of the competitive dynamic in the wireless industry.[32] The current screen also results only in more *detailed* analysis of a proposed transaction's competitive effects, but not necessarily a more *stringent* or *critical* analysis. The broken screen has enabled AT&T and Verizon to engage in

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27 DOJ Ex Parte Submission, at 1.

28 *See Ex Parte* Letter from Dick Thornburgh to FCC Commissioners, WT Docket No. 12-269 (filed June 3, 2013).

29 *See Ex Parte* Letter from Competitive Carriers Association, *et al*. to FCC Commissioners, WT Docket Nos. 12-269, 12-268 (filed May 20, 2013).

30 *See* Comments of the Competitive Carriers Association, *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269 (filed Nov. 28, 2012).

31 *Policies Regarding Mobile Spectrum Holdings*, Notice of Proposed Rulemaking, 27 FCC Rcd 11710 ¶ 35 (2012).

32 *See, e.g., Verizon-SpectrumCo Order*, ¶¶ 54-58.

the wave of consolidation and secondary market transactions as detailed above that has nearly returned the industry to its former duopoly state.

Consequently, the Commission should amend its screen to better reflect today's competitive realities. The Commission should adopt a separate screen for low-frequency spectrum in light of the significance of such spectrum to competition. The Commission also should apply a nationwide screen in addition to its local screens. While mobile wireless telecommunications services are generally sold to consumers in local markets, these markets are affected by nationwide competition.[33] Furthermore, the Commission should re-evaluate which spectrum bands are "suitable and available," and therefore counted under the screen.[34] And the Commission should strengthen its competitive review of transactions that exceed the screen. The record in the mobile spectrum holdings proceeding is complete. The Commission should act promptly to implement its revised screen no later than by the year's end, to more accurately assess the ongoing spate of secondary market transactions involving AT&T and Verizon.

In addition, the Commission can promote access to spectrum by ensuring that its upcoming broadcast incentive auction is structured in a manner that promotes participation by a broad array of carriers, including competitive carriers. The incentive auction will be enormously complex, and CCA commends the detailed work that the Commission's staff has done to date in developing the rules for the auction. Because the auction represents potentially the only near-term opportunity for carriers to access low-frequency spectrum, and because a missed opportunity could further entrench the dominance of AT&T and Verizon, the Commission should take special care to ensure that the auction rules promote participation by a broad range of

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33 DOJ Ex Parte Submission, at 19-20.

34 *See* Comments of the Competitive Carriers Association, *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269 at 14-16 (filed Nov. 28, 2012).

carriers. As the Chairman of the Senate Subcommittee on Communications, Technology, and the Internet noted about the 700 MHz auction in 2008, "[h]istory will show that the way the FCC structured the auction basically helped the two big wireless companies to the detriment of competition in this country" by allowing the two largest carriers to outbid opponents and "basically control the auction after that."[35] The FCC must not allow history to repeat itself.

The Commission should ensure that the 600 MHz auction does not result in similar dominance by AT&T and Verizon. Congress gave the Commission the authority to "adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition."[36] Consistent with that mandate, the Commission should apply its newly revised spectrum screen to the auction proceeding, which will allow the two largest carriers to bid on spectrum where needed, but prohibit aggregation of a majority of the repurposed spectrum made available—to the detriment of competitors and competition.[37] The Commission also should employ bidding credits and related mechanisms that would promote participation by rural, mid-sized, and regional carriers. In addition, the Commission should make spectrum available in small geographic areas, such as Cellular Market Areas, to maximize the participation of competitive carriers and the utilization of freed spectrum. And the Commission should reject calls to employ blind bidding and package or combinatorial bidding practices that favor the

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[35] John Eggerton, *Pryor: FCC 'Fouled Up' Spectrum Auction*, Broadcasting & Cable, Feb. 26, 2008, *available at* http://www.broadcastingcable.com/article/112604-Pryor_FCC_Fouled_Up_Spectrum_Auction.php.

[36] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6404, 126 Stat. 156, 230 (2012).

[37] If the Commission fails to adopt a revised screen for spectrum below 1 GHz prior to formulating the incentive auction rules, it is critically important for the Commission to adopt auction rules preventing carriers with excessive below 1 GHz holdings from obtaining a disproportionate amount of 600 MHz spectrum.

largest carriers. These measures will be vital to the success of the auction, and by extension to the advancement of competition in the wireless industry.

B. Access to Devices

The Commission can also take steps to improve competition by promoting competitive access to handsets and other devices. The Commission has recognized "[h]andsets and devices are a central part of consumers' mobile wireless experience, and a key way by which providers differentiate their offerings."[38] Device interoperability is a prerequisite to a well-functioning wireless marketplace; it encourages innovation, provides clear expectations and market stability, gives consumers more choices, and reduces costs to carriers and therefore end users. Interoperability also makes roaming technologically possible because non-interoperable devices simply cannot roam on other carriers' networks.

Interoperability among spectrum bands was standard practice for two decades. At the recent Senate Commerce, Science, and Transportation's Subcommittee on Communications, Technology, and the Internet State of Wireless hearing, Senator Warner noted this standard practice and urged policymakers to develop a "growing consensus [and] not lose track of that fact that we would not have wireless systems in America but for the requirement the FCC made 35 years ago on interoperability."[39] Nevertheless, after the close of Auction 73, AT&T took steps to create a private band class that prevented the development of interoperable devices in the Lower 700 MHz band. As a result of AT&T's unjustified balkanization of the Lower A Block, 12 MHz of beachfront, broadband-capable spectrum and almost $2 billion in investment by

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[38] 16th Wireless Competition Report ¶ 2.

[39] Archived Webcast: State of Wireless Communications (U.S. Senate Committee on Commerce, Science, & Transportation June 4, 2013) at 1:26:50, *available at* http://www.commerce.senate.gov/public/index.cfm?p=Hearings (click on "06-04/13 – State of Wireless Communications" link in the June 2013 section).

CCA's members have been nearly stranded, and the Lower 700 MHz lacks a functional device ecosystem, all to the clear detriment of consumers.

The Commission has before it a pending proceeding to restore interoperability in the Lower 700 MHz band.[40] As CCA has explained, the Commission has ample legal authority to require interoperability, as it has done for every other spectrum band designated for wireless telecommunications services. The record in that proceeding is fully developed, and all legitimate technical and engineering testing and evidence show that are no valid concerns of harmful interference.[41] Therefore, the Commission should restore interoperability in the Lower 700 MHz with all deliberate speed. Doing so would be strongly in the public interest, and would promote competition, investment, and job growth while freeing up much-needed, low-band spectrum for wireless services. The Commission also should ensure that similar problems do not arise in the 600 MHz band by implementing *ex ante* rules requiring interoperability across the band as part of its auction rules.

Access to devices also has been impaired by the recent controversy over device "unlocking." The largest carriers have tried for years to frustrate device access by selling "locked" phones that cannot be used once a consumer changes to a different provider. While such devices can be "unlocked," the Librarian of Congress recently concluded that the unlocking

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40 *Promoting Interoperability in the 700 MHz Commercial Spectrum*, Notice of Proposed Rulemaking, WT Docket No. 12-69 (Mar. 21, 2012).

41 *See* D. Hyslop and P. Kolodzy, *Lower 700 MHz Test Report: Laboratory and Field Testing of LTE Performance near Lower E Block and Channel 51 Broadcast Stations*, WT Docket No. 12-69 (Apr. 11, 2012); Reply Comments of V-Comm, L.L.C., Prepared on behalf of Cavalier Wireless, Continuum 700, King Street Wireless, MetroPCS Communications, Inc., Vulcan Wireless LLC, WT Docket No. 12-69 (July 13, 2012).

exemption to copyright liability under the Digital Millennium Copyright Act should expire.[42] The ensuing consumer backlash prompted a sharp rebuke from the White House for the Copyright Office's decision, explaining that "consumers should be able to unlock their cell phones without risking criminal or other penalties," and that unlocking is "important for ensuring we continue to have the vibrant, competitive wireless market that delivers innovative products and solid service to meet consumers' needs."[43] Former Chairman Genachowski likewise recognized that a ban on unlocking "raises serious competition and innovation concerns."[44] Several pieces of legislation have been introduced by Congress to rectify the Copyright Office's decision. CCA commends these efforts and supports allowing consumers the ability to take the device of their choosing to the network that best fits their needs and desires.[45] CCA urges the Commission to continue to work with industry and with Congress to allow consumers to unlock devices.

C. Access to Networks

In addition to spectrum on which to offer service and devices to sell their subscribers to use in conjunction with their service, competitive carriers need access to infrastructure to complete and connect their networks. Competitive carriers rely on roaming agreements with

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42 Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65260 (Oct. 26, 2012) (to be codified at 37 C.F.R. pt. 201).

43 White House, "It's Time to Legalize Cell Phone Unlocking," Mar. 4, 2013, available at https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1g9KhZG7.

44 FCC, "Statement from FCC Chairman Julius Genachowski on the Copyright Office of the Library of Congress Position on DMCA and Unlocking New Cell Phones," Mar. 4, 2013, available at http://tinyurl.com/c4hhsaf.

45 *See* Testimony of Steven K. Berry, President and CEO, Competitive Carriers Association, "H.R. 1123, the 'Unlocking Consumer Choice and Wireless Competition Act,'" U.S. House Committee on the Judiciary, Subcommittee on Courts, Intellectual Property and the Internet (June 6, 2013), *available at* http://judiciary.house.gov/hearings/113th/06062013/Berry%2006062013.pdf.

nationwide carriers to provide their customers with seamless nationwide voice and data service, as well as longstanding interconnection obligations to terminate calls to incumbents' subscribers. In both contexts, AT&T and Verizon, by virtue of their ubiquitous networks and market power, have the ability and incentive to exclude competitors and harm competition.

With respect to data roaming, CCA and its members were heartened by the Commission's adoption of rules requiring wireless carriers to offer data roaming on commercially reasonable terms and conditions, and were pleased to stand with the Commission in successfully defending those rules before the D.C. Circuit against a challenge by Verizon.[46] But as the Commission's most recent Wireless Competition Report acknowledges, "the ability to negotiate data roaming agreements on non-discriminatory terms and at reasonable rates remains a concern."[47] CCA's members continue to face challenges in achieving roaming arrangements with AT&T and Verizon on commercially reasonable terms and conditions, and find it challenging to negotiate roaming agreements without information regarding the terms and conditions that the Twin Bells are offering to other carriers, or to their own affiliates. The Commission should continue to keep a watchful eye on the market for data roaming agreements, and should take action if necessary to prevent AT&T and Verizon from wielding their market power to extract rates or conditions that impede competition.

In addition, the Commission has begun to accelerate its efforts to facilitate the transition to IP-based networks and IP-based interconnection.[48] Conceptually, CCA agrees that the state of technology is driving forward inexorably toward an all-IP world, and that the Commission can

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46 *See Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

47 16th Wireless Competition Report ¶ 210.

48 *See Pleading Cycle Established on AT&T and NCTA Petitions*, Public Notice, GN Docket No. 12-353, DA 12-1999 (Dec. 14, 2012).

take constructive steps to promote a seamless transition to IP-based interconnection between networks. However, AT&T has used the IP-transition as an opportunity to seek relief from fundamental interconnection obligations under Section 251 of the Communications Act.[49] Relieving AT&T from interconnection obligations merely because of the technology used to interconnect would be contrary to the statute and Commission policy, and profoundly misguided as a practical matter.

As the Commission noted in the National Broadband Plan, "[b]asic interconnection regulations . . . have been a central tenet of telecommunications regulatory policy for over a century," and "[f]or competition to thrive, the principle of interconnection . . . needs to be maintained."[50] ILECs such as AT&T and Verizon, by virtue of their ubiquitous and entrenched networks, have substantial market power and the ability to exclude competitive carriers from the telecommunications marketplace by denying them interconnection, regardless of technology. The Commission already has concluded that the interconnection provisions of Section 251 "are technology neutral" and "do not vary based on whether one or both of the interconnecting providers is using TDM, IP, or another technology in their underlying networks."[51] The Commission should reaffirm that the fundamental interconnection and arbitration obligations under Section 251 and 252 of the Act apply, regardless of technology, to enable competitive carriers to interconnect with next-generation telecommunications networks. CCA is eager to work with the Commission to create a seamless transition to IP-based interconnection while retaining the critical backstops provided by Sections 251 and 252 of the Act.

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49 47 U.S.C. § 251.

50 Connecting America: The National Broadband Plan, at 49 (2010), available at http://download.broadband.gov/plan/national-broadband-plan.pdf.

51 *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 ¶ 1342 (2011).

D. Access to Appropriate Universal Service Funding

Finally, the entire wireless industry would become more competitive if the Commission were to adopt common-sense universal service policies that take a more technologically neutral tact and reflect current consumer choice.

Competitive carriers' ability to acquire and deploy spectrum resources in rural and other high-cost areas, including tribal lands, is tied in part to the Commission's approach to distributing universal service funds. The Commission has explicitly recognized the important benefits of and demand for mobile services, and the need to provide support to providers of voice and mobile broadband services in areas where such services cannot be sustained or extended without ongoing support.[52] "Tribal lands [also] have significant telecommunications deployment and connectivity challenges,"[53] and the Commission has previously recognized that "many Tribes suffer the effects of limited availability of wireless services on Tribal lands."[54] According to the Commission, "greater access to wireless services would offer members of Tribes and others on Tribal lands significant economic opportunities and increased social benefits."[55]

In spite of these needs, benefits and opportunities, however, the Commission changed course in its *USF/ICC Transformation Order* and called for substantial reductions in the amount of high-cost support flowing to wireless providers. Disregarding evidence of continued growth in the demand for wireless services skyrockets and dissipating wireline connections, the

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52 *See, e.g., Further Inquiry Into Issues Related to Mobility Fund Phase II*, Public Notice, WC Docket No. 10-9 *et al.*, DA 12-1853 at ¶¶ 3-4 (rel. Nov. 27, 2012).

53 *Tribal Mobility Fund Phase I Auction Scheduled for October 24, 2013; Comment Sought on Competitive Bidding Procedures for Auction 902 and Certain Program Requirements*, Public Notice, AU Docket No. 13-53, DA 13-323 at ¶ 2 (rel. Mar. 29, 2013).

54 *Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands*, Notice of Proposed Rulemaking, 26 FCC Rcd 2623, 2624 ¶ 1 (2011).

55 *Id*.

USF/ICC Transformation Order determined that its new Mobility Fund should be limited to a one-time allocation of $300 million, and $500 million in follow-up annual support through Phase II of the fund (including a $100 million set aside for Tribal Mobility Fund).

In contrast to the decision to slash funding for wireless providers, the *USF/ICC Transformation Order* significantly *increased* the funding available to incumbent local exchange carriers ("LECs")—including in particular by giving price cap carriers a right-of-first-refusal to receive $1.8 billion in annual funding through the Phase II of the Connect America Fund ("CAF"), and the $2 billion-plus made available to rate-of-return carriers.[56]

CCA has on multiple occasions urged the Commission to restore a more competitively and technologically neutral framework for ensuring that voice and broadband services are delivered to as many Americans as possible.[57] In particular, CCA has explained that the problems associated with separate funding mechanisms could be mitigated if the relative budgets for wireline and wireless support were not skewed so dramatically in favor of wireline carriers.[58] A comparison of the results of Phase I of CAF and Mobility Fund demonstrate why this should be the case. While price cap carriers refused more than half of the funding made available to

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56 As a result of the *USF/ICC Transformation Order*, funding for wireless carriers was reduced by approximately 60 percent while funding for the price cap carriers increased by more than 60 percent. Wireless carriers now receive less than 20 percent of the amount allocated for either the price cap carriers or the rate-of-return carriers.

57 *See generally* Comments of RCA—The Competitive Carriers Association, WC Docket No. 10-90 *et al.* (filed Jan. 18, 2012); *Ex Parte* Letter of RCA — The Competitive Carriers Association, WC Docket No. 10-90 *et al.* (filed Aug. 3, 2012); *Ex Parte* Letter of Rebecca Thompson (CCA), Ross Lieberman (ACA), Steven Morris (NCTA), Matt Larsen (WISPA), Dean Marson (EchoStar), Jeffrey Blum (DISH Network, LLC), and Michael Rapelyea (ViaSat, Inc.), WC Docket No. 10-90 (filed Dec. 14, 2012); Comments of Competitive Carriers Association, AU Docket No. 13-53 (filed May 10, 2013).

58 Comments of RCA—The Competitive Carriers Association, WC Docket No. 10-90 *et al.* at 3 (filed Jan. 18, 2012).

them on a right-of-first-refusal basis,[59] wireless carriers committed to deploying services to high-cost areas through a competitive bidding process that effectively put to use nearly every dollar allocated for Phase I of the Mobility Fund.[60] Despite these facts, the Commission most recently rejected proposals to expand Phase I CAF support beyond price-cap carriers to mobile providers.[61]

As CCA has explained, consumers across the country have demonstrated their preference for mobile communications, yet the Commission's *USF/ICC Transformation Order* continues to put a thumb on the scale in favor of inefficient, legacy ILECs with respect to the distribution of universal service funding.[62] Such a naked preference is wholly unjustified and runs contrary to the Commission's stated goals of improving the efficiency of the USF system. CCA encourages the Commission to adopt funding rules that treat all carriers in a fair and technology-neutral manner, and that enable all carriers to compete on a level playing field for universal service funds.

CONCLUSION

For three straight Wireless Competition Reports, the Commission has concluded that the wireless industry is highly concentrated and becoming more concentrated. That trend unfortunately continues, and will accelerate if the Commission does not implement policies that

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59 *See* Press Release, FCC, *FCC Releases New Interactive Map Illustrating States Set to Receive 'Connect America Fund' Support to Bring 400,000 Americans High-Speed Broadband* (June 26, 2012). The price cap carriers left unclaimed $185 million of the $300 million allocated in Phase I.

60 *Mobility Fund Phase I Auction Closes, Winning Bidders Announced for Auction 901*, Public Notice, DA 12-1566, 27 FCC Rcd 12031 (rel. Oct. 3, 2012).

61 *Connect America Fund*, Report and Order, WC Docket No. 10-90, FCC 13-73 at ¶ 38, n.73 (rel. May 22, 2013).

62 *See, e.g.*, Comments of Competitive Carriers Association, *Connect America Fund, etc.*, WC Docket No. 10-90, WT Docket No. 10-208 (filed Dec. 21, 2012).

ensure a level competitive playing field. The Commission should use its latest analysis of wireless competition as a springboard to focus on pro-competitive, pro-consumer policies that ensure that competitive carriers have access to spectrum, devices, networks and universal service support in a manner that reduces concentration and promotes the public interest.

Respectfully submitted,

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